

**BEFORE A SPECIAL EDUCATION
HEARING OFFICER FOR THE STATE OF TEXAS**

DECISION OF THE HEARING OFFICER

**STUDENT, b/n/f/ PARENT,
Petitioner**

§
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v.

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§

DOCKET NO. 146-SE-0211

**VICTORIA
INDEPENDENT SCHOOL
DISTRICT,
Respondent**

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REPRESENTING PETITIONER:

REPRESENTING RESPONDENT:

**Christopher Jonas
Attorney at Law
3349 Jamaica Drive
Corpus Christi, Texas 78418
Telephone: (214) 426-2272
Facsimile: (972) 218-5648**

**Charlotte Salter
Walsh, Anderson, Brown, Gallegos &
Green, P.C.
P.O. Box 2156
Austin, Texas 78768
Telephone: (512) 454-6864
Facsimile: (512) 467-9318**

**James N. Hollis
Attorney at Law
6338 North New Braunfels Avenue,
Number 211
San Antonio, Texas 78209
Telephone: (210) 216-6990
Facsimile: (888)627-5810**

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Petitioner	§	
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v.	§	HEARING OFFICER
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VICTORIA INDEPENDENT	§	
SCHOOL DISTRICT,	§	
Respondent	§	FOR THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

Statement of the Case

Petitioner *** (“the Student”), by next friend, *** (“the Parent”),¹ requested a due process hearing pursuant to the Individuals with Disabilities Education Improvement Act (“IDEA”), 20 U.S.C. §1400, *et seq.*, against Respondent Victoria Independent School District (“the District”).

Petitioner was represented by attorneys Christopher Jonas and James N. Hollis. Respondent was represented by attorney Charlotte Salter. The Texas Education Agency (“TEA”) received this due process request and issued the notice of filing on February 28, 2011. The due process hearing, originally set for April 5, 2011, was continued for good cause shown to accommodate a two-day setting to May 4-5, 2011, but due to serious medical needs of counsel was continued by agreement of the parties for good cause shown to September 14-15, 2011, with a revised Decision Due Date of October 3, 2011.

The due process hearing began as planned on September 14, 2011, and a second hearing day took place on September 15, 2011. The parties were unable to finish essential witnesses by the end of the second hearing day, agreeing to keep the record open and finish remaining witnesses by telephone. However, due to a lengthy list of Respondent’s remaining witness and at the insistence of the Hearing Officer, plans were made to schedule a third hearing day in lieu of the expense and difficulty of hours of conference call testimony. Respondent filed a Motion for Continuance requesting two additional hearing days, denied by the Hearing Officer as unwarranted on September 30, 2011, but allowing the parties one week to work out scheduling issues for a third hearing day setting by October 10, 2011. The parties complied with the scheduling deadline and the procedural schedule was revised for a third hearing day on November 15, 2011, and extending the Decision Due Date to December 30, 2011.

The third hearing date took place on November 15, 2011, at which time the parties confirmed their agreement to submit written closing statements after receipt of the record on December 23, 2011, and revising the Decision Due Date to January 13, 2011, granted for good cause shown. All three hearing days took place at the District’s administrative offices in Victoria, Texas. A certified court reporter transcribed the proceedings.

The record closed upon the timely filing of the parties’ written closing statements on December 23, 2011, and the Hearing Officer timely issued the Decision of the Hearing Officer on January 13, 2012.

Minutes of Admission, Review, and Dismissal Committee (“ARDC”) Meeting – November 15, 2011

Respondent offered the minutes of the November 15, 2011, ARDC minutes into evidence during the second day of the due process hearing and again on the third hearing day. [Respondent’s Ex. (“R.Ex.”) 167)]. Petitioner

¹ The Student’s mother and father fully participated in all aspects of this dispute and throughout all pertinent periods of the Student’s education within the District. The use of the singular “Parent” reflects the listing of the Student’s mother as next friend in this litigation.

objected to the admission of this exhibit. After consideration of the arguments of counsel, this exhibit was not admitted into evidence at the time of the close of the record on December 23, 2011.

Petitioner alleged a denial of a free appropriate public education (“FAPE”) by the following actions and inactions of Respondent:

1. Failure to identify the Student as a student with a disability in need of special education and related services due to a disability of Autism Spectrum Disorder;
2. Failure to provide Extended School Year (“ESY”) services for Summer ***;
3. Failure to conduct agreed classroom observations by an Applied Behavior Analysis (“ABA”) specialist of Petitioner’s inappropriate classroom behaviors, such as slapping an aide;
4. Failure to provide training specific to the Student for teachers working with the Student;
5. Alteration of the Student’s educational program by removing special education staff from the campus;
6. Failure, as previously agreed, to provide progress reports to the parents in Fall ***;
7. Failure to address regression over the holiday *** break (December ***);
8. Failure to provide assistive technology (“AT”) as previously agreed; and,
9. Failure to provide appropriate social skills training as previously agreed.

As relief, Petitioner seeks the following:

1. A FAPE in the least restrictive environment (“LRE”) with any/all appropriate evaluations, any/all appropriately implemented modifications, interventions, and services which are effective, goal-oriented, and educationally beneficial;
2. Up to one year of compensatory educational services, as deemed appropriate by the Hearing Officer; and,
3. An order that Respondent convene a meeting of the ARDC for implementation of the Decision of the Hearing Officer.

Based upon the evidence and argument admitted into the record of this proceeding, the Hearing Officer makes the following findings of fact and conclusions of law:

Findings of Fact

Background

1. The Student resides within the jurisdictional boundaries of the district with student’s parents and siblings. At the time of the hearing, the Student was *** years old. [Transcript (“Tr.”) at 71].
2. The Student currently qualifies for special education and related services under the disability classification of Speech Impairment (“SI”). [Petitioner’s Exhibit (“P.Ex.”) 34B; R.Ex. 129].
3. In ***, the Student began public education services at age *** through the *** program by means of an *** to address developmental delays. The Student received *** services for one year. [P.Ex. 33; R.Exs. 1 and 2; Tr. at 80].
4. At age ***, the Student began a *** program for children with disabilities *** within the District based on eligibility of SI and ***. Under the ***, the Student received speech therapy, occupational therapy (“OT”), and services for social skill development. [P.Exs. 1 and 17; R.Exs.11 and 13; Tr. at 85].
5. In ***, the Student received an extended school day in *** to prepare for ***. At the time the Parent filed the due process complaint in February 2011, the Student was in a general education *** class. The Student completed *** in May *** within the mainstream general education setting. [P.Exs. 2, 7, 10, and 34B; R.Exs. 27, 38, 71, 129, and 144].

6. On ***, the Parent withdrew the Student from the District to begin a homeschooling program. As of the close of the record, the student continues to be homeschooled. [R.Ex. 165; Tr. at 368 and 388-389].

Early Interventions

7. At age *** in March ***, developmental pediatric specialist ***, evaluated the Student for concerns of developmental delays and tactile defensiveness. Dr. *** performed physical and neurological examination, developmental testing with the Autism Diagnostic Observation Schedule (“ADOS”), Module I, and gathered input from the Parent. Dr. *** determined the student met the Diagnostic and Statistical Manual IV (“DSM-IV”) criteria for a medical diagnosis of high functioning Autism associated with encephalopathy, speech delays, and motor delays. [P.Ex. 18; R.Ex. 3; Tr. at 71-72, 78-81, and 130-131].

8. Dr. *** recommended interventions of five hours per week of ABA therapy, 90 minutes per week of one-on-one speech therapy, and one hour per week of one-on-one OT services. The Student’s family followed through with these recommendations using the District’s services as well as services from private providers. [Tr. at 80-83, 253-254, and 557-558].

Full and Individual Evaluation

9. In October ***, the District performed a Full and Individual Evaluation (“FIE”) of the Student using the ***, designed to assess receptive and expressive language skills of ***, finding the Student’s scores indicated a severe speech language disorder. The Student’s severely limited language skills were not able to be assessed during evaluation. Speech skills of the Student included the use of gestures, signs, single words, and limited phrases. The Student exhibited delays in communication skills, self-care skills, social skills, and motor skills. [P.Ex. 17; R.Ex.12].

10. In October ***, the District held the Student’s *** ARDC meeting because the Student’s ***. The ARDC determined the Student qualified for special education based on SI and Non-Categorical Early Childhood with speech language therapy and positive behavior management services to address tantrum and screaming behaviors. The ARDC proposed an OT evaluation of the Student by December ***. [P.Ex. 1; R.Exs.11 and 13; Tr. at 85].

11. From ***, the Student received private OT services through a private provider. The student received 45-minute sessions three times a week from ***, decreasing to two 45-minute sessions a week in ***. [P.Ex. 31; R.Ex. 145; Tr. at 253-254].

12. The Student received private speech therapy services from a private provider beginning in 2007. [P.Ex. 31; R.Ex. 145; Tr. at 557-558].

*** _ ***

13. Around the time the Student entered the *** classroom in Fall ***, the Parent recalls that the student had difficulty transitioning into ***, exhibiting behaviors of screaming meltdowns, visual stimming behaviors, tactile defensiveness, and echolalia. [Tr. at 86].

14. In January ***, the ARDC added OT services to the Student’s program to address the Student’s difficulties with transitions, fine motor skills, and some gross motor skills. The ARDC reviewed the medical evaluation by the developmental pediatrician, Dr. ***. Participants agreed to evaluate the student for eligibility based on Autism by March ***, with plans to convene an ARDC for review of the new information by April ***. [P.Ex. 4; R.Ex. 16].

15. The District’s multidisciplinary autism team completed an autism evaluation of the Student in April ***. This evaluation used the Childhood Autism Rating Scale (“CARS”) using evaluation from teacher observations, autism team observations and evaluations, and parental report. Petitioner scored a *** on the CARS, falling in the “non-autistic” range. [R.Ex. 18].

16. The ARDC reviewed this report on April 28, ***, concluding that the student did not meet Autism eligibility educationally. The ARDC continued the *** as appropriate. Noting the Student's progress since entering a school-based program, the ARDC used the Autism supplement to address the Student's "Autism-like" traits to avoid missing any early intervention strategies. As the Student's *** would end at age ***, the ARDC planned another evaluation for Autism be done prior to the Student's *** birthday. [P.Ex. 3; R.Ex. 18, 19, and 21; Tr. at 554-556].

17. The Student made progress in OT, ***, and sustaining eye contact by the end of the *** school year. At this time, the Student did not require a Behavior Intervention Plan ("BIP"). The April *** ARDC added an extended school day in *** for the Student's *** program to prepare for *** in ***. [P.Ex. 3 at 27; R.Ex. 20 at 27].

Summer * ESY**

18. The District provided ESY services to address the Student's self-help, cognitive, and social skills in Summer ***. The Student attended 14 days of ESY, exhibiting daily screaming, failure to use words and regression from regular school year classroom behaviors. The District conducted a Functional Behavioral Assessment ("FBA") during the ESY session with observation in home and at school of maladaptive behaviors of leaving areas of instruction, squealing, and tantrum behaviors including crying, screaming, kicking, and lying on the floor. The FBA included positive behavioral management techniques to minimize the maladaptive behaviors. [R.Exs. 22 and 24].

*** _ ***

19. The Student continued non-compliance with requests and screaming behaviors into the *** school year. The October *** ARDC reviewed the Student's program, considered but rejected the Parent's request for a one-on-one classroom aide for the Student, and agreed to perform an FBA and develop a BIP with assistance of a behavioral consultant. [P.Ex. 2 at R.Ex. 27 at 26].

20. In November and December ***, two observations of the Student's behavior by an independent behavioral consultant showed reported classroom concerns of poor peer relationships, poor expressive language, use of echolalic language, repeating the same phrase over and over, and reciting phrases heard on television. The January *** ARDC reviewed the completed observation information and noted some progress by the Student on time for task completion and increased peer interactions. The ARDC developed a BIP to address compliance with teacher directives and decreasing loud vocalizations by the Student. [P.Ex. 6; R.Exs. 31 and 32].

***** ESY**

21. Following the winter and spring holiday breaks of ***, the Parent and the Student's *** teacher reported it took "significant time" for the Student to catch up. As a result, the ARDC determined the Student needed ESY for Summer *** to help the Student ***. [P.Ex. 3 at 27 and P.Ex. 6; R.Ex. 20 at 27 and R.Ex. 32; Tr. at 90-91].

22. The Student received ESY services through *** in the summers of ***, a private school in ***, Texas. The private program has a small classroom setting with a 5:2 student-to-teacher ratio for children ages *** to ***. [Tr. at 97].

*** _ ***

23. The ARDC convened to plan for the Student's *** school year when the Student would be *** years old. The ARDC participants agreed to a *** classroom for the Student *** and a *** classroom of typically-developing peers as tolerated ***, with the goal for the Student to attend *** class all day by the end of the first semester. The Parent gave input on increased social skills at home and the Student's reports about having fun at school. Teaching personnel noted the Student's use of words "no" and "don't touch me," good math skill ability,

and, progress over the course of the second semester. The Student had decreased screaming, increased ability to work in groups, and increased compliance with requests and demands. [P.Ex. 7 at 14-15; R.Ex. 33 at 14-15].

24. The Student had social skills individualized educational programs (“IEPs”) in the *** school year based on the “BRIDGE Early Childhood Curriculum.” [P.Ex. 14; R.Ex. 34].

25. In October ***, the Student’s annual ARDC review planned to complete the re-evaluation six months early by April 1, ***, to allow for review by the ARDC in May ***. The ARDC anticipated placement of the Student into a general education *** class for the *** school year. [P.Ex. 9; R.Ex. 38].

26. The ARDC agreed to retain an independent Board Certified Assistant Behavior Analyst (“BCABA”) to observe the Student in the *** classroom. ***, a BCABA with the Central ***, observed the Student in the *** classroom in February ***. The BCABA believed most of the Student’s behaviors were minimal, of one occurrence, and did not disrupt the *** environment. The BCABA recommended development of a plan to address distracting behaviors that might impede socialization such as humming, talking in a high-pitched voice, or bossing peers, but did not recommend teacher training for the teaching staff. Instead, the BCABA recommended a “staffing” take place before Fall *** of current and receiving education staff in preparation for the Student’s next school year. [P.Ex. 39; R.Ex. 42; Tr. at 394].

Private ABA Therapy

27. The Student consistently received private ABA therapy from ***, a Board Certified Behavior Analyst (“BCBA”), from July 20, ***, until July ***. *** dismissed the Student from therapy as she believed the Student no longer needed individual sessions. Instead, she believed that the Student’s needs are being addressed through the school environment and social situations. [R.Ex. 58 and 158; Tr. at 37-38 and 41].

District * Re-evaluation**

28. On March 31, ***, the District issued the re-evaluation report on the Student. A multi-disciplinary team of two District psychologists and a speech language pathologist performed the evaluation with input from the Student’s previous and current teachers, the school nurse, and the Parent. Results identified significant educational/developmental needs in the areas of behavior, social skills, and speech-language skills. The multi-disciplinary team recommended continued special education eligibility for the Student under NCEC and SI. [P.Ex. 22 at 25; R.Ex. 43 at 25].

29. The March *** re-evaluation administered the ADOS. On the ADOS, the Student scored within the “non-autistic” range except for the Student’s score on social interaction. The Student scored within the Autism Spectrum Disorder range on social interaction, suggesting an area of weakness of interacting with others and social skills as a whole. Because of “interdiscrepancies” or conflicting information in the test results based on the ADOS, the multi-disciplinary team recommended additional testing in the areas of achievement, intellectual functioning, and Autism using a “cross-battery” approach, allowing comparison of standard scores taken from different tests. [P.Ex. 22 at 11; R.Ex. 43 at 11; Tr. at 571-572 and 610].

30. The Cattell-Horn-Carroll (“CHC”) Cross-Battery Assessment provides guidelines so assessments can use multiple tests to measure a broader range of tests than might be available using only one test battery. [P.Ex. 20 at 4; R.Ex. 58 at 4].

31. On May 24, ***, the ARDC convened to review new testing data and discuss the Student’s placement *** in 2010-2011. The ARDC continued the Student’s eligibility for speech-language therapy and OT services and made plans to gather more testing of the Student’s psychological processing abilities. [P.Ex. 10 at 26; R.Ex. 42 at 32].

32. By May ***, the Student’s *** teacher noted the Student had met many IEP goals and was ***classrooms. The Student had continued difficulty with transitions, but “warnings” of transitions by means of pictures and flip-charts assisted this process. [P.Ex. 10 at 26; R.Ex. 45 at 32].

33. The May *** ARDC discussed the Parent’s concern about the Student’s feet, shoes, lights, and over-stimulation, noting that these areas “needed to be looked at, at the beginning of the school” as adjustment might be needed to help the Student transition. [P.Ex. 10 at 27; R.Ex. 45 at 33].

34. The May *** ARDC agreed to place the Student for the *** year into a general education *** classroom with speech therapy and OT services, with modifications of a BIP, paraprofessional support as needed, and peer tutoring. Documentation of the meeting shows the student was making “great progress” and evidenced the following abilities: a) counting to 100 independently with no prompts; b) reading; c) cutting on the line and using the correct amount of glue on a project; d) writing first name and working on writing last name; e) knowing first and last names, address, and phone numbers; f) tracing simple templates; g) coloring within the lines; h) recognizing all 26 letters of the alphabet; and i) working on writing the alphabet and numbers one through ten. [P.Ex. 10 at 13 and 26; R.Ex. 45 at 19 and 32].

35. The Parent expressed concern for a place for “down time” for the Student in the classroom, requested continuing Therapeutic Listening with earphones as a calming technique, and expressed concern that staff in the Student’s assigned *** campus needed training in Autism to be able to understand and serve the Student. [P.Ex. 10 at 26; R.Ex. 45 at 32].

36. The May *** ARDC discussed ESY for the Student for Summer ***. The ARDC determined the Student did not meet regression criteria for ESY and the Parent did not disagree with the ARDC decisions at this meeting. During the meeting, the Parent informed the District that the Student would attend *** for summer services and would be doing private therapy in the summer. [P.Ex. 10; R.Ex. 45].

*** _ ***

37. The Parent requested placement of the Student at the home campus for the *** school year, the same campus where *** served as a special education teacher. [P.Ex. 29 at 3; R.Ex. 56 at 3].

38. The Student adapted quickly at the beginning of the *** school year with no extreme circumstances noted by the *** teacher, ***. [Tr. at 508].

39. On August 27, ***, the District sought and obtained parental consent for the additional psychological testing of the Student. On the same date, the Student’s *** gave input to the District’s Licensed Specialist in School Psychology (“LSSP”) that the Student was “doing great” in *** but that the Student’s *** teacher reported some *** from the Student. The Student’s *** suggested Therapeutic Listening and *** as calming devices. The *** planned to check on *** for the Student’s classroom. [P.Ex. 45 at 3; R.Ex. 52 at 3].

40. At the beginning of the Student’s *** year in Fall ***, the Student attempted to hit the paraprofessional after Physical Education (“P.E.”) class. The Parent prepared a chart for the *** teacher to track how the Student did through the school day and wrote a letter to the campus principal concerning the Student, the Parent’s experiences “constantly pursuing and pushing for [the Student’s] rights, and why I will not accept a diagnosis less than ASD (Autism Spectrum Disorder) from a district when student qualifies by the state requirements according to the legal framework adopted by [the District].” The Parent requested classroom observations by a person familiar with ABA to help in the development of the Student’s BIP. [P.Ex. 29 at 1-4; R.Ex. 56 at 1-2].

41. The Student’s *** teacher used a chart provided by the Parent to track the Student’s behavior. [Tr. at 523-524].

42. The District completed the supplemental assessment of the Student in September ***. The completed assessment reviewed previous testing with interview information from the *** teacher, *** teacher, and the current *** teacher. The *** teacher reported the Student did not present academic problems, was the *** in the class, produced detailed artwork, possessed good coloring and fine motor skills, and showed improvement in

*** activities. On occasion, the *** teacher reported *** and screaming a couple of times by the Student, but the Student stopped “when talked to.” Socially, the Student showed preference to play with things chosen by other students and to “take over” in play activities with other students, occasionally appearing to get agitated over things that do not typically agitate others. [P.Ex. 20 at 7; R.Ex. 58 at 7].

43. The LSSP interviewed the Parent as part of the September *** supplemental assessment. The Parent expressed concern about the Student’s social skills as “extremely socially delayed” with skills close to the ***-year-old level and reported ***, verbal stimming behaviors, ***, and humming by the Student. The Parent enforced a restrictive gluten-free diet for the Student due to significant food allergies and chemical sensitivity. [P.Ex. 20 at 6; R.Ex. 58 at 6].

44. The September *** supplemental assessment included ratings on the Gilliam Autism Rating Scale – Second Edition (“GARS-2”), a screening test for identifying persons with Autism, by the Parent, and the Student’s ***, ***, and *** teachers. Ratings on the GARS-2 were: Parent – Very Likely; *** special education teacher – Unlikely; *** general education teacher – Unlikely; and *** general education teacher – Possibly. [P.Ex. 20 at 9; R.Ex. 58 at 9].

45. In the September *** supplemental assessment, the District’s LSSP concluded that social interaction was an area of weakness for the Student, but the Student exhibited more intense and severe behaviors within the home setting that had not reached the same level of severity within the assessment or school environment. The LSSP concluded that the Student did not show an educational need for special education services based on Autism. Recommendations included individual and/or group counseling services from the general education counselor, sensory integration evaluation of sensory needs, development of social skills, and continued collaboration with the Parent to address strengths, weaknesses, and any behavioral changes that may occur for the Student. [P.Ex. 20 at 9-10; R.Ex. 58 at 9-10].

46. As part of the September *** supplemental assessment, the District’s LSSP interviewed the Student’s private BCBA, reporting *** opinion that the Student appeared to be a self-centered child with difficulty seeing things beyond self, and as a result, has difficulty sharing with others. The LSSP reported *** statement that, “[the Student] has some issues, but I’m not sure it is Autism....[I’m] not really seeing a lot of Autism.” [P.Ex. 20 at 8-9; R.Ex. 58 at 8-9].

47. At hearing, the Student’s BCBA denied the accuracy of the BCBA’s interviewed statement in the LSSP’s September *** supplemental assessment that the Student was a self-centered child with difficulty seeing things beyond self, but agreed that the Student received an ample amount of ABA therapy between September *** and July ***. [Tr. at 55-58].

48. The District’s Special Service Coordinator, ***, is an ABA Trainer of Trainers (“ABA-TOT”), a certification received through the ***. On October 6, ***, *** went to the Student’s classroom for observation of the Student in the *** class. Having not met the Student before the observation, she was unable to pick the Student from among other peers by observation without assistance. The Student showed compliant and engaged behavior with no inappropriate behaviors. In the P.E. class, the Student exhibited some growling and non-compliance, but was again compliant and engaged upon return to the classroom. Based on the observation, *** recommendations included consideration of removing the one-on-one aide in the classroom because the Student is an independent learner in the classroom, and the collection of ABA data for inappropriate behavior for antecedent determination. [R.Ex. 61 at 3-4; Tr. at 450-451].

49. On October 15, ***, the Parent wrote to District Special Services Coordinator *** and complained that multiple ABA observations had not been done. The Parent wanted a minimum of two observations in two weeks. [R.Ex. 66].

50. On October 20, ***, the Student’s P.E. teacher *** wrote a letter to the Student’s ARDC committee expressing concern that the Student have continued assistance from a paraprofessional aide during P.E. class. In

the first 42 days of school as of this date, the Student needed assistance of the paraprofessional aide “at least $\frac{3}{4}$ of the time.” [P.Ex. 29 at 14; R.Ex. 69].

51. The Student’s annual ARDC convened on October 21, ***, to review the supplemental evaluation, the recent classroom observation, and review the Student’s program. The Parent supplied a set of notes to augment documentation of the October *** ARDC meeting. Participants reviewed and modified the Student’s BIP; reviewed, modified, and accepted a draft social skills IEP; and, discussed the Parent’s request for weekly general education counseling. The ARDC did not recommend special education eligibility due to Autism and continued the Student’s eligibility for special education services continued as SI with continued OT and speech therapy services. [P.Ex. 11; R.Ex. 71].

52. The District’s Special Services Coordinator, ***, wrote to the Parent on October 21, ***, agreeing to provide a second ABA observation of two different days at two different times, with each observation to be one hour in length. [P.Ex. 29 at 16; R.Ex. 70].

53. The Parent disagreed with the October *** ARDC decision, waived a ten-day recess, and requested an independent educational evaluation (“IEE”) at school district expense. The District agreed to provide the IEE, to provide the counseling services requested by the Parent, but deferred discussion of the paraprofessional aide support until after completion of the FBA and IEE. [P.Ex. 11; R.Ex. 71]

54. The Student had a social skills IEP in place for the period of October ***, through October ***. The Student’s social skills IEP included a summary note concerning the Student’s present levels of functioning. At this time, the Student worked above grade level in the *** class and could request help on academic tasks, but had difficulty requesting help in social situations and sharing with others. The Student participated in the classroom and completed work, but expressed needs in a social situation by “making ‘noises’ (squealing)” when a peer has something wanted by the Student. [R.Ex. 73 at 1].

55. Following the October *** ARDC meeting, general education counselor *** began a social skills group specifically for the Student with two typically-developing peers who were not in need of social skill training. The counselor ran the group from November *** through May ***. [R.Ex. 73 at 1-3; Tr. at 668].

56. *** is a special education teacher. *** works for the District and was assigned as the special education teacher on the Student’s campus in the beginning of the *** school year. The campus principal assigned *** to the *** classroom. *** was in the Student’s classroom each day for 30 minutes to assist the Student after P.E. class in transitioning back into the general education classroom. She helped the Student put on therapeutic headphones when needed and also helped keep the Student on task for work completion. [Tr. at 318].

57. On or about October 25, ***, *** was reassigned from the Student’s campus. The Parent, upset about this change, wrote to the District’s LSSP, ***, stating her belief that there would be no special education support on the Student’s campus with ABA training. In reply, *** forwarded the Parent’s concerns to the District’s Special Service Coordinator with ABA training, ***, and assured the parent that services for a special education student were developed based on the performance, competencies, and needs of a student regardless of the eligibility category. [P.Ex. 28 at 16].

58. After October 25, ***, a paraprofessional aide, ***, was assigned to the Student’s classroom to assist the Student and other students within the regular education *** classroom. [Tr. at 328-329].

59. There are no ARDC documents requiring a special education teacher to serve as an inclusion teacher or to serve as an aide in the Student’s *** classroom. At hearing, both *** and the Parent acknowledged that there were no ARDC requirements that specified *** assignment to the Student’s classroom. [Tr. at 328 and 377].

60. On November 8, ***, the District obtained consent for the IEE by ***. [R.Ex. 79].

61. On November 9, ***, ***, observed the Student for a second observation in three settings of the *** classroom, during speech therapy, and during P.E. The Student followed instructions, with no inappropriate behaviors, participated well in speech therapy, and answered “who, what, and why” questions. [P.Ex. 30; R.Ex. 80].

62. On November 29, ***, the Parent wrote the Student’s *** teacher concerning her observation that the Student missed sensory input from the school setting over the Thanksgiving *** holiday break. She observed the Student holding “monologues with self” by asking questions, giving answers, and delivering verbal praise without acknowledging anyone else. The Parent saw regression in the home setting and asked the *** teacher to document any regression at school in order for the Student to be eligible for ESY. [P.Ex. 28 at 18-20; R.Ex. 84 at 1-3].

63. The BCABA specialist from ***, ***, observed the Student on December 1, ***. In P.E. class, the Student fully participated in independent activities, used reciprocal language with peers and the teacher, and complied with teacher’s verbal re-direction. In the *** classroom, the Student attended to the teacher during group lessons, used reciprocal language with peers and the teacher, followed the classroom routine fluently, and exhibited neat and legible handwriting compared to other students within the same group. The BCABA concluded that the Student was “indistinguishable” from peers within the *** classroom and did not stand out. [P.Ex. 39; R.Ex. 85; Tr. at 407-408].

64. In preparation for the Student’s FBA, District LSSP *** observed the Student for 11.5 hours on four dates between November *** and January ***. The LSSP noted the Student’s ability to use spontaneous speech, interactions with peers, and many appropriate social and compliant behaviors. On January 6, ***, the Student exhibited behaviors of humming and ***, but after redirection was able to work quietly before appropriately interacting with peers. The LSSP did not note regression by the Student after holiday breaks. [P.Ex. 24].

65. On January 14, ***, the Student’s *** teacher issued a progress report concerning the previous nine-week grading period. Based on data collected by the *** teacher, the Student had 25 infractions for “following teacher directives within 45-60 seconds,” 80% of which followed redirection after confrontation for misbehavior. After the misbehavior, the Student complied within 45 seconds. Overall, the *** teacher reported a decrease in redirections of the Student for loud vocalizations, noting the Student had made “great progress” in following directions, positive social interactions, and taking turns. [P.Ex. 15; R.Ex. 90].

66. The Parent and *** teacher communicated on January 26, ***. The Parent expressed concern over increased anxiety and stimming behaviors observed at home, reiterating previous concerns about classroom *** to help prevent over-stimulation of the Student. The Parent reported recent *** of the Student in afternoons and on weekends. The ** teacher did not observe regression from the Student following holiday break, noting no problems with *** behavior and reporting recent ability of the Student for redirection when upset without teacher proximity or hand-holding. The *** teacher also reported the Student did not want to use headphones for Therapeutic Listening. [P.Ex. 28 at 29-31; R.Ex. 92].

67. At hearing, the Parent reported the *** symptoms of the Student persisted between four to six weeks into January *** and recalls one incident in the school setting. [Tr. at 378-379].

68. The District’s LSSP *** issued the completed FBA report on January 27, 888. Based on the observation of the Student, the LSSP identified positive behaviors of the student including use of manners, interacting with peers appropriately, work completion, participation in instruction, appropriate line behavior, sustained attention to task or instruction, and appropriately initiating conversation with peers and adults. [P.Ex. 24; R.Ex. 94; Tr. at 777-791].

69. The LSSP used the Functional Assessment and Intervention System (“FAIS”), Teacher Form, a standardized instrument designed to determine strengths by identification of positive behaviors and weaknesses by identification of challenging behaviors, to get input from the Student’s *** teacher. On the FAIS, competencies identified by the *** teacher included participating appropriately in a large group, interacting positively with peers, accepting feedback and redirection, negotiating and accepting compromises, keeping focused on work or tasks, and transitioning appropriately from changing tasks/activities. The Student’s *** teacher did not identify any problem behavior as “mostly” occurring, but instead rated 19 behaviors as “sometimes” occurring and seven behaviors as “rarely” occurring. The *** teacher noted that the Student disliked it when others receive praise for work if the Student did not also receive praise. [R.Ex. 94 at 4; Tr. at 777-791].

70. Problem behaviors identified on the January *** FBA report include: a) making noises or sub-vocalizations; b) off-task behaviors; and, c) non-compliance behaviors. The LSSP concluded that the Student’s behavior was not at a level to warrant a BIP at the present time as the Student’s behavior “appears to be redirected by teacher without further pressing.” The FBA report found current classroom management procedures in place sufficient to meet the Student’s behavior needs and recommended the development of positive behavior supports. [R.Ex. 94 at 8-9].

71. As of January 27, ***, the Parent had not received the Student’s progress reports in speech, OT, social, and academic areas, but had received the *** behavioral progress report from the *** teacher. The Parent wrote the campus principal to request this information, to ask when *** would be installed within the Student’s classroom, and to question whether teachers with the Student had received training as requested by the Parent in the May *** ARDC meeting. [P.Ex. 28 at 33; R.Ex. 95].

72. On January 28, ***, *** conducted a third observation of the Student. At the time of the observation, the Student engaged and participated in computer class and a group activity. When the Student required minor redirection, the Student immediately complied. During an unexpected campus lock down drill during the observation, the Student remained calm, composed, and compliant with the routine change. [R.Ex. 96; Tr. at 467-469].

73. On February 2, ***, the Parent again wrote to the campus principal regarding missing progress reports, ***, and questions concerning teacher training. The Parent confirmed at hearing the eventual receipt of all the progress reports. [P.Ex.28 at 35; R.Ex. 100; Tr. at 378].

74. The *** teacher kept behavior progress reports for the Student between December *** and February ***. The Student complied with teacher directives for the majority of this period with many notations of “good day” and “followed teacher directives” within targeted period of time. [P.Ex. 15; R.Ex. 105].

75. ***, the BCABA, met with the Student’s *** and P.E. teachers on February 16, ***. Both teachers reported good progress for the student, noting improvement in behavior, skills, and socialization since the beginning of the *** school year. The BCABA’s notes from this meeting indicate “classroom rules and behavior management system is appropriate for the student.” [P.Ex. 39 at 5; R.Ex. 111].

76. The BCABA, ***, did not recommend additional teacher training after the meeting with Petitioner’s teachers on February 16, ***, as the Student was succeeding in the classroom and the BCABA did not want the teachers to change what they were doing successfully within the classroom. The BCABA did not suggest any additional modifications, extra prompts, or changes in the classroom management system. [P.Ex. 39 at 5; R.Ex. 111; Tr. at 411-414].

77. The Student left school early for private therapies *** during the *** school year. The Student missed approximately 84.5 hours and missed six school days by February ***. [P.Ex. 26; R.Ex. 115].

78. The Parent informed the Student's *** teacher that she had retained legal counsel by February 17, ***. In response, the *** teacher noted that the Student had adjusted extremely well to the regular classroom, had lots of friends, and expressed excitement to see and interact with peers each day. [P.Ex. 28 at 50; R.Exs. 113 and 119 at 35].

79. On February 18, ***, the District sent notice of the Student's ARDC meeting to review completed assessment data on March 9, ***. [R.Ex. 117].

80. On February 28, ***, the Parent consented to discontinuation of the Student's therapeutic listening with headphones based on information from the Student's occupational therapist. [R.Ex. 119 at 38].

81. The BCABA, ***, completed another observation of the Student on March 2, ***. The Student used appropriate spontaneous language and play on the playground, used reciprocal language, made appropriate requests for attention from adults and peers, and made appropriate requests for information from adults. The BCABA had no recommendations for the *** classroom teacher at this time. [P.Exs. 39 and 40; R.Exs. 123 and 157; Tr. at 415].

82. The BCABA found no issues for the Student with the physical environment of the classroom and made no recommendations for any additions to that environment. [P.Ex. 39; R.Ex. 123; Tr. at 419-420].

***** IEE**

83. The Student's IEE by Dr. *** took place over January 7 and February 16, ***. Dr. *** reviewed background information from school, medical, and private assessments, conducted structured interviews of the Parent and the Student's *** and *** teachers, and the Student's current *** teacher. Dr. *** observed the student at home and at school. In addition to using testing of the Student from March and September ***, Dr. *** performed new assessment of the Student's cognitive abilities using the Differentiated Ability Scales II and selected subtests from the NEPSY II, as well as informal measures of sensory and motor function. The IEE also included new testing with the Wechsler Individual Intelligence Tests. [P.Ex. 25; R.Ex. 125; Tr. at 169-170].

84. Dr. *** assessment identified cognitive function deficits in four areas likely to impact the Student's behavioral presentation and academic progress of simple auditory working memory. First, the Student has limited simple auditory memory, impacting the ability to retain and process other's verbal productions at a typical conversational rate. Second, the Student processes information – particularly visual information – at a slower level than expected given intellectual ability, reducing accuracy especially relative to speed. Third, the Student is inconsistent in accuracy of retrieval of information from memory storage, impacting the context in which new events are interpreted. Fourth, the Student has difficulty inhibiting an “overlearned” or habitual response and replacing it with a new one. Although the Student possesses relatively good self-monitoring skills, Dr. *** noted these skills are slow, so that responses will have already occurred before the Student's “better judgment” kicks in regarding the appropriateness of those responses. [P.Ex. 25 at 15; R.Ex. 124 at 15].

85. In the March *** IEE report, Dr. *** identified deficits in the Student's memory functions and information processing ability affecting attention, concentration, responsiveness in social situations, and comprehension of classroom activities. [P.Ex. 25; R.Ex. 124].

86. As part of the *** IEE to assess the Student's emotional and behavioral functioning, Dr. *** gathered information from the Student's classroom teacher and the speech pathologist serving the Student with the teacher forms of the Vineland Adaptive Behavior Scale (“Vineland”), the Social Responsiveness Scale (“SRS”), and the Behavior Assessment System for Children, 2nd Edition (“BASC-2”). [P.Ex. 25 at 1; R.Ex. 124 at 1; Tr. at 169-170].

87. Scores on the Vineland showed consistency between response from the Parent and two instructional staff, indicating that the Student generally exhibits a similar skills set at home and at school. [P.Ex. 25 at 14; R.Ex. 124 at 14].

88. Scores rated on the BASC-2 as “clinically significant” range suggest a high level of maladjustment; scores in the “at risk” range may either identify problems that may not be severe enough to require intervention or indicate a potential problem that may need monitoring. Scores of two instructional staff on this instrument generated valid profiles with no clinical scales rated as “clinically significant” by either rater and with “at risk” ratings for negative emotionality and adaptability. Dr. *** found these scores suggest: a) the Student tends to react negatively when faced with changes in everyday activities and routines; and, b) the Student requires longer to recover from difficult situations than most other peers of the same age. [P.Ex. 25 at 13; R.Ex. 124 at 13; Tr. at 177-178].

89. The *** IEE included ratings by the Parent and two instructional staff on the SRS. Scores on the SRS within the severe range are strongly associated with clinical diagnoses of autism spectrum disorders and suggest severe interference in everyday social interactions. Scores within the mild to moderate range are typical of “high functioning” Autism conditions, indicating significant deficiencies in reciprocal social behavior. On this instrument, the Parent rated the student in the severe range for social cognition, social communication, autistic mannerisms, and the overall score. One instructional staff member rated the student in the mild to moderate range overall. The second instructional staff member’s scores suggested the absence of Autism. [P.Ex. 25 at 12; R.Ex. 124 at 13; Tr. at 179-181].

90. Dr. *** met with the Student’s *** teacher and the *** teacher in the course of preparing the *** IEE. Dr. *** admitted at hearing that the interview of the Student’s *** teacher was relatively brief, “I worked with her while we were observing on the playground.” [Tr. at 211-214].

91. The *** IEE did not include the ADOS instrument because the District had used this instrument in recent testing without indicating which testing module had been used. [P.Ex. 25; R.Ex. 125; Tr. at 170-171].

92. Dr. *** written *** IEE report noted the Student’s progress since the initial Autism diagnosis at age *** by the Student’s developmental pediatrician. This progress, in Dr. *** opinion, was likely due to the early intensive interventions provided by the Parent of private therapies and from the targeted programs offered by the District. [P.Ex. 25 at 14; R.Ex. 124 at 14].

93. In the *** IEE, Dr. *** concluded that the current evaluation results “clearly support the ongoing presence of an autism spectrum disorder, at a level of severity that requires specialized instruction in order for [the Student] to be able to access the curriculum and to participate meaningfully with [the Student’s] teachers and peers in the educational process.” [P.Ex. 25 at 14; R.Ex. 124 at 14].

94. Recommendations included in the *** IEE report include the development of a highly structured and comprehensive social skills curriculum with dedicated trained staff available to the Student throughout the school day. Dr. *** recommended multiple and various opportunities to practice social skills in controlled environments with peers who demonstrate age-appropriate skills. [P.Ex. 25 at 15-16; R.Ex. 124 at 15-16].

95. Dr. *** adopted the medical opinion of Dr. *** that the Student had high functioning Autism. [P.Ex. 25; R.Ex. 124].

96. Dr. *** written *** IEE report of the Student did not include any information from the Student’s general education counselor regarding the Student’s weekly general education counseling sessions. [R.Ex. 139; Tr. at 219-224].

March * ARDC Meeting**

97. On March 24, *** the ARDC convened to review the completed FBA and the IEE. Participants in the meeting included legal counsel, the Parent, Dr. ***, and nine District personnel including three LSSPs, the occupational therapist, the speech-language pathologist, and the Student’s *** teacher. As part of the deliberations, District personnel discussed the Student’s current needs, reviewed the December *** FBA, the

previous and current BIPs, noted that the Student had reached all goals on the BIP, and received updates on the Student's progress on OT goals. [P.Exs. 34-A and 34-B; R.Exs. 129 and 130].

98. The March *** ARDC included extensive discussion of the *** IEE by all participants in a professional and orderly manner. [P.Exs. 34-A (Discs Nos. 1-4)].

99. In the March *** ARDC, Dr. *** reviewed her report finding the ongoing presence of an Autism Spectrum Disorder and her recommendations, noting that most concerns are in the area of social skills. Dr. *** expressed an inability to do a multi-disciplinary process as an independent evaluator, and although she was currently in the process of putting together such a team to be able to do a multi-disciplinary review as an IEE, she clarified, "...but for right now, I don't want to make a definitive statement that goes beyond what our best practice is either as psychologist or as an LSSP in terms of making a statement when I have not done best practice because I am not geared up to do that at this time." Dr. *** stated that she did not diagnose, but that she supported the diagnosis previously made by Dr. ***. [P.Exs. 34-A (Disc No. 3) and 34-B; R.Ex. 129].

100. Dr. *** recommended using videotapes to help the Student with social skills analysis and debriefing. [P.Exs. 25, 34-A (Disc No. 3), and 34-B; R.Exs. 124 and 129].

101. At the March *** ARDC meeting, Dr. *** expressed concern that the Student's progress was due to interventions. The student has benefitted from what has been done so far. Without appropriate supports, as the academic and social environment becomes more demanding, the Student will likely need continued and additional supports. Regarding social skills, Dr. *** noted that with Autism as "life-time disability," it is important to maintain the level of support "so that you don't allow there to be a gap that develops again that you're going to try to close again." [P.Exs. 34-A (Disc No. 3) and 34-B; R.Ex. 129].

102. At the March *** ARDC meeting, the Parent asked about progress in obtaining *** that had been used in the Student's *** classroom. The occupational therapist planned to research the ***. [R.Ex. 129 at 74].

103. The March *** ARDC did not add Autism as a category of eligibility for the Student. The Parent signed in disagreement with the March *** ARDC decision that the Student was not eligible for special education and related services based on the eligibility area of Autism. [P.Ex. 34-B at 19; R.Ex. 129 at 20 and 75-76].

104. On March 28, ***, the District sent Prior Written Notice to the Parent, repeating the ARDC's refusal to add Autism as a special education and related services eligibility area for the Student. The notice stated the ARDC's agreement to *** and the ARDC's decision that the Student does not need a BIP at the current time. [R.Ex. 130].

105. *** in the *** class by March ***. The *** teacher did not observe any change in the Student after the ***. [Tr. at 384 and 527-528].

106. The Parent admitted that no professional had recommended the addition of 1*** for the Student as a required technology device. [Tr. at 485].

107. Dr. *** evaluated the Student again in May ***. At this time, the developmental pediatrician determined that the Student continued to show characteristics of Autism or pervasive developmental disorder, although many skills had improved. Dr. *** used the DSM-IV criteria to determine a medical diagnosis of the Student of Autism Spectrum Disorder due to: a) marked impairment of nonverbal behaviors; b) failure to develop peer relationships; c) other than with parents, failure to demonstrate a spontaneous seeking to share enjoyment, interests, or achievements of other people; and, other than parents, demonstrating a lack of enjoyment of social or emotional reciprocity. [P.Ex. 42, R.Ex. 162].

108. Dr. *** May *** report recommends interventions of intensive speech-language therapy, social and behavioral interventions, and visual supports. [P.Ex. 42 at 11; R.Ex. 162 at 11].

109. Dr. *** recommends development of an IEP under the eligibility of “Autism Other Health Impaired,” with “Speech Impairment Learning Disability” as a second eligibility. [P.Ex. 42 at 13; R.Ex. 162 at 13].

110. Dr. *** May *** report found the Student in need of OT, and without OT, would be at high risk of Dysgraphia – a disorder of written writing skills – and never developing adequate writing skills. [P.Ex. 42 at 11-12, R.Ex. 162 at 11-12].

111. Dr. *** did not talk to any District personnel in connection with the 2011 evaluation of the Student and at hearing, could not recall if the Parent had been handed a checklist to give to the District as part of the evaluation process. [Tr. at 130-131].

112. Dr. *** used input from the Parent in the March 2007 evaluation and a subsequent report in May ***, but did not use input from private service providers or speak to District teachers and staff working with the Student in either evaluation. [Tr. at 130-131].

113. The Student’s *** teacher, ***, had 20 years of teaching experience. In March ***, the *** teacher completed seven hours of on-line training entitled “Monitoring Student Behavior: The Teacher’s Role” and “Autism and Positive Behavioral Intervention Strategies” through Direct Specialized Training for Education Professionals. [R.Ex. 127; Tr. at 537].

114. The Student has never been labeled within the school setting as a student eligible for special education and related services due to Autism. [P.Ex. 34-A (Disc No. 3)].

115. The District completed at least two classroom observations by an ABA analyst as promised to the Parent before May *** The Parent agreed at hearing that these observations took place. [Tr. at 376].

116. Upon the transfer of t*** off the Student’s *** campus on or around October ***, there was no special education teacher on the Student’s campus. [R.Ex. 130].

117. The Student did not require a special education teacher at the Student’s campus during the *** school year. The Student received services as a student with speech language impairment within the staffing in place on the *** campus. [R.Ex. 130; Tr. at 510-512].

118. After the move of *** to another campus, other District special education staff were available to give input into the Student’s progress reports for the remainder of the *** school year, including input from ***, the District’s speech therapist serving the Student. [P.Ex. 34-A (Disc No. 3); Tr. at 510-512].

119. The Student’s *** P.E. teacher believed the Student made very good progress during the *** year. [Tr. at 491-496].

120. The Student’s *** grades steadily throughout the year. [R.Ex. 144].

121. The Student has never been labeled as “Autistic” within the public school setting. [P.Ex. 34A (Disc No. 3)].

122. In spite of repeated attempts by the District to find a convenient ARDC meeting time, neither the Parent nor her attorney participated in an ARDC meeting after the Student withdrew from the District. [Tr. at 358-359].

123. At 8:00 a.m. on September 15, 2011, approximately one hour before the start of the second due process hearing day, the ARDC convened at 8:00 a.m. to discuss programming for the Student's *** year. The ARDC proceeded without the presence of the Parent or her attorney. [Tr. at 358-359 and 747-748].

Discussion

The applicable limitations period in this dispute is from February 28, 2010, to present. 19 TEX. ADMIN. CODE §89.1151(c). Petitioner bears the burden of proof to establish by a preponderance of the evidence that the district violated the provisions of IDEA. *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983), *aff'd on other grounds sub nom., Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984); *Schaffer v. Weast*, 126 S.Ct. 528 (2005).

Public school districts must develop and provide eligible students with an appropriate program. The U.S. Supreme Court developed a two-prong test for determining whether a school district's program provides a FAPE: 1) whether the school district complied with the procedural requirements of IDEA, and, 2) whether the school district offered a program to the student that was reasonably calculated to provide educational benefit. *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982). An educational program is a meaningful one if it is reasonably calculated to produce progress rather than regression or trivial educational advancement. *Id.*; *Houston ISD v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000).

A procedural violation of IDEA does not result in a denial of FAPE unless the violation results in the loss of educational opportunity to the student or seriously infringes upon the parents' opportunity to participate in the provision of FAPE to the student. 34 C.F.R. §300.513(a)(2); *Adam J. v. Keller ISD*, 328 F.3d 804 (5th Cir. 2003).

The inquiry on whether or not a substantive violation of IDEA occurred centers on whether a school district provided the student with the requisite educational benefit. School districts are not required to maximize a student's potential but instead are charged with the responsibility to provide an education that enables the student to achieve some benefit. Some benefit means an educational program that is meaningful and offers more than minimal educational benefit; it must be "likely to produce progress, not regression or trivial educational advancement." *Cypress Fairbanks Independent School District v. Michael F.*, 118 F.3d 245 (5th Cir. 1997).

Courts have not adopted a specific substantive standard to determine when FAPE has been provided. The Fifth Circuit further defined a FAPE by delineating four factors to consider as indicators of whether an educational plan is reasonably calculated to provide the requisite benefits: 1) Is the educational program individualized on the basis of the student's assessment and performance; 2) Is the program administered in the least restrictive environment; 3) Are the services provided in a coordinated and collaborative manner by key stakeholders; and 4) Are positive academic and non-academic benefits demonstrated? *Id.* at 253.

The designation of a particular eligibility classification under IDEA is procedural in nature and does not constitute a denial of FAPE unless the student's program is inappropriate and fails to provide the student with a FAPE. *See, Student v. George West ISD*, Docket No. 310-SE-0810 (SEA TX 2011). The IDEA at §1412(a)(3)(B) specifies:

Nothing in this chapter requires that children be classified by their disability so long as each child who has a disability listed in Section 1401 of this title and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under this subchapter.

20 U.S.C. §1412(a)(3)(B).

Thus, the underlying purpose of IDEA remains the provision of appropriate educational services that are *individualized* to address a student's individual needs. The Seventh Circuit addressed the task of school districts to be that of developing an appropriate education rather than "coming up with a proper label." *Heather S. v. Wisconsin*, 125 F.3d 1045, 1055 (7th Cir. 1997). *See also, Pohorecki v. Anthony Wayne Local School District*, 637 F.Supp. 2d 547 (N.D. OH 2009) (Classification of disability is not critical to determination of FAPE; instead, the

FAPE determination rests on whether the goals and objectives are appropriate for the student); *Eric H. v. Judson ISD*, 2002 U.S. Dist. Lexis 20646 (W.D. TX 2002) (Eligibility dispute classification where student remains eligible for special education is procedural in nature and parent must prove change in eligibility status resulted in cognizable harm to student); *Student v. Banquette ISD*, Docket No. 048-SE-1010 (SEA TX 2011).

In this proceeding, where the Student at all times remained eligible for special education and related services following the District's refusal to add the category of Autism in addition to the SI eligibility, Petitioner must show that the refusal to add the Autism eligibility label was inappropriate and resulted in harm to the Student by causing the development of an inappropriate program that did not provide an educational benefit under IDEA. The Student alleges that the District did not adequately address the Student's needs specifically for social skills, ESY, and assistive technology.

Eligibility Based on Autism Spectrum Disorder

The Parent believes the central issue in this dispute concerns the refusal of the District to recognize the Student's eligibility for special education and related services based on Autism. This dispute presents the interesting fact situation where a student "ages out" of a disability classification that applies for children ages three through five.

The IDEA's implementing regulations at 34 C.F.R. §300.8(b) defines an eligible child experiencing developmental delays between ages three through nine as a "child with a disability," but allows state agencies to further limit the age range to "any any subset of that age range, including ages three through five" to include a child—

- (1) Who is experiencing developmental delays, as defined by the State, and as measured by appropriate diagnostic instruments and procedures, in one or more of the following areas: Physical development, cognitive development, communication development, social or emotional development, or adaptive development; and,
- (2) Who, by reason thereof, needs special education and related services.

The Texas Commissioner's Rules define the "Noncategorical Early Childhood" ("NCEC") eligibility area as follows:

- (13) Noncategorical. A student *between the ages of 3-5* who is evaluated as having mental retardation, emotional disturbance, a specific learning disability, or autism may be described as noncategorical early childhood.

19 TEX. ADMIN. CODE §89.1040(c)(13) [emphasis added].

Under IDEA's implementing regulations at 34 C.F.R. §300.8(c)(1), Autism is defined as:

- (c)(1)(i) Autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.
- (ii) Autism does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance, as defined in paragraph (c)(4) of this section.
- (iii) A child who manifests the characteristics of autism after age three could be identified as having autism if the criteria in paragraph (c)(1)(i) of this section are satisfied.

In Texas, Autism eligibility classification is defined in 19 TEX. ADMIN. CODE §89.1040(c)(1) as follows:

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(1) Autism. A student with autism is one who has been determined to meet the criteria for autism as stated in 34 C.F.R. §300.8(c)(1). Students with pervasive developmental disorders are included under this category. The team's written report of evaluation shall include specific recommendations for behavioral interventions and strategies.

It is undisputed that the District served the Student as eligible for special education and related services at the beginning of the limitations period (February 28, 2010) under both NCEC and SI and had done so through the Student's *** and *** years. As defined above, the "NCEC" category is not only separate and distinct from "Autism" under Texas Commissioner's Rules, the NCEC category has a specific age range. Upon reaching the Student's *** birthday in ***, continued eligibility under NCEC was not available for the Student. The District made plans for re-assessing the Student *** months early in *** and followed through with those plans by March ***.

When the District's results showed additional need for achievement, intellectual, and Autism testing with a "cross-battery" approach, allowing comparison of standard scores taken from different tests, the District gathered more data. Of particular note, during this time period, the District continued with the special education program for the Student and made plans for transitioning the Student to the general education *** setting; Petitioner does not allege services were "changed" or "dropped" for the Student in Spring ***. However, upon the completion of the additional assessment, the ARDC convened in November *** to review the new information, resulting in the ARDC decision that the Student would not be eligible in the school setting as a student with Autism, and, of course, removing the "NCEC" eligibility because of the Student's "aging out" of the classification upon turning age ***. The record reflects the Parent's request for, and the District's granting, an IEE.

Petitioner offers two reports and the telephone testimony of developmental pediatric specialist, ***, and the IEE and telephone testimony of Peggy Goulding, Ph.D., to prove that the Student was eligible for special education services based on the eligibility of Autism, discussed separately below.

A. Medical Reports

Dr. *** made the student's initial medical diagnosis at age *** in *** under the DSM-IV criteria of high functioning Autism associated with encephalopathy, speech delays, and motor delays. The sources of information used in the evaluation did not include input from the Student's current *** educators regarding the Student's functioning within that setting and does not form a picture of the Student's school functioning.

After this evaluation, the Parent carefully implemented from this time forward all the interventions recommended by Dr. *** including on-going ABA therapy, speech language therapy, and occupational therapy. These efforts were augmented by the District's provision of special education and services as the Student progressed through the *** into the general education setting of the *** classroom. It was at the end of the student's *** year when Dr. *** re-evaluated the Student and issued the second report in ***. Dr. *** interviewed and examined the Student, but did not gather information from the private service providers or from current or previous District teachers and staff working with the Student to see if her observations were consistent with Petitioner's teachers and special education professionals who had now worked with the Student for *** years. At the hearing, Dr. *** gave unpersuasive testimony concerning her reasons for not consulting school staff. [Tr. at 130-131].

I found Dr. *** subsequent May *** report and hearing testimony unconvincing and unpersuasive on the issue of whether or not the Student exhibited Autism within the school setting. First, I note that Dr. *** did not apply the IDEA eligibility criteria for Autism, using instead the DSM-IV criteria to determine that the Student met criteria for Autism. Second, Dr. *** found the Student to be "at risk" for Dysgraphia, yet the record is silent about any other provider's or educator's concerns about the Student's writing abilities. Third, the therapy need areas identified by Dr. *** were well-established by the District, and the Student was receiving on-going services in these areas. Finally, the record reflects that the ARDC never had the opportunity to consider the May *** ARDC report with the participation and input of the Parent.

B. *** IEE Report

Upon the Parent's disagreement with the District's completed re-evaluation and additional assessment, the Parent requested – and the District granted – an IEE by Dr. P***, a psychologist in private practice. Dr. *** performed the IEE in January and February ***. The evaluator used a variety of sources of data including input from the Parent, teachers, and observations of the Student in the school and home setting, and a review of the Student's records that included school, medical, and therapy records. I find several concerns about the evaluation results.

First, Dr. *** report expressed concern over the Student's social skills, yet the evidence established a limited inquiry into what programs at the District were in place to address the Student's social skills. The interview by Dr. *** of the Student's current teacher was brief, conducted on the playground. As shown by her hearing testimony, Dr. *** remained unaware that the District was addressing the Student's social skills by means of a small social group with two typically-developing peers run by the general education counselor.

Second, Dr. *** made the determination that the evaluation results supported the presence of an Autism Spectrum Disorder, but in making that determination, she relied on the *** medical diagnosis of Dr. *** that had been made without input of the *** educators or private therapists familiar with the Student.

Third, Dr. *** also participated in the March *** ARDC meeting to review her evaluation and to explain her conclusion supporting Autism eligibility for the Student. During the meeting, she acknowledged the necessity of a multi-disciplinary process to make such a determination. She specifically clarified that her private practice at the current time is not set up for such a multi-disciplinary process as an independent evaluator. [P.Ex. 34A (Disc 3)]. Throughout the ARDC meeting, Dr. *** supported the good progress made by the Student up to the present time, affirming both District and parental efforts to provide such support and interventions. I found it significant, however, that Dr. *** focus remained on what *might* happen in the future to avoid development of “a gap” that would need to be closed again. [P.Ex. 34A (Disc 3)]. Dr. *** discussions point to sincere concern about keeping the progress that the Student now exhibits over the educational years to come. After this discussion and consideration, the ARDC remained unconvinced that the Student should be eligible for Autism in the school setting at the current time.

Dr. *** conclusion is unconvincing in light of the Student's current demonstrable progress within the educational setting. It is understandable that the ARDC remained unpersuaded by the report that affirmed the Student's progress. The report noted the need for continued social skills development, affirmed the progress achieved, and affirmed current progress being made by the Student within the *** general education setting. Petitioner did not meet petitioner's burden to show that the District should have found the Student eligible as a Student with Autism based on this report at the current time.

Summer *** Extended School Year (“ESY”) Services

Implementing regulations of IDEA mandate the provision of extended year services to special education students that are necessary for the provision of FAPE. 34 C.F.R. §300.106(a)(1). In Texas, ESY services are individualized instructional programs beyond the regular school year for eligible students with disabilities determined by the ARDC based on formal and/or informal documentation provided by the district or the parents. 19 TEX. ADMIN. CODE §89.1065. This documentation must show that the student, in one or more critical areas addressed in the student's current IEP objectives, has exhibited, or reasonably may be expected to exhibit, severe or substantial regression that cannot be recouped within a reasonable period of time. *Id.* Under §89.1065(2), severe or substantial regression means that the student has been, or will be, unable to maintain one or more acquired critical skills in the absence of ESY services. Section 89.1065(3) defines the reasonable period for recoupment of acquired critical skills to be determined on the basis of needs identified in the student's IEP and shall not exceed eight weeks. A skill is considered critical when the loss of that skill results, or is reasonably expected to result, in one of five occurrences during the first eight weeks of the next regular school year: a) placement in a more restrictive environment; b) significant loss of acquired skills necessary for the student to appropriately progress in the general curriculum; c) significant loss of self-sufficiency in self-help skills areas as evidenced by an increase in the number of direct

service staff or amount of time to provide special education and related services; d) loss of access to community-based independent living skills; or, e) loss of access to job training. 19 TEX. ADMIN. CODE §89.1065(4).

Petitioner bears the burden to show that the Student demonstrated the loss of a critical skill that could not be recouped in the fall semester of the *** school year within a reasonable period of time. Petitioner failed to meet this burden. Instead, the evidence showed that the Student adapted well at the beginning of the Student's *** year, as confirmed by *** as well as the ***teacher. Petitioner did not present evidence that *** ESY was necessary for the Student to avoid the loss of critical skills or that the Student suffered demonstrable harm by not receiving *** ESY services.

Classroom Observations by Applied Behavior Analysis (“ABA”) Specialist

The Parent complained that the ABA observations of the Student did not take place on two different days, agreed to by District personnel in October ***. The Parent wanted the observations done rapidly, but evidence does not show District agreement to a deadline for the two ABA observations. The preponderance of the evidence showed, and the Parent agreed at hearing, that the promised ABA classroom observations took place by May ***. [Tr. at 376]. The Parent did not present any evidence as to how delaying the classroom observations harmed the Student.

Provision of Teacher Training Specific to the Student

Petitioner bears the burden to show that the District failed to provide teacher training and the failure to do so caused harm to the Student. The evidence established that the Student's *** teacher with 20 years of teaching experience, ***, received two courses specific to behavior management and Autism/positive behavioral interventions in March ***.

The evidence further established that the BCABA specialist *** specifically looked at the issue of teacher training and did not recommend Autism training for the Student's teachers for *** school years because of successful implementation of instructional and behavioral management techniques within the Student's classroom. At hearing, the BCABA testified that the student was in the regular classroom all day, was taking cues from the natural environment used by regular education students, and was successful within the regular education environment, “And so I did not want to train [the teachers] on a child that would actually have needs, because that could change how [the teachers] would handle [the Student]. And that could have social implications and educational implications.” [Tr. at 411-414]. I found BCABA's testimony to be credible. Petitioner did not meet the burden to show the Student's teachers were improperly trained and that the lack of such training harmed the Student or kept the Parent from participating in the District's educational program for the Student.

Removal of Special Education Staff from the Student's Campus

Petitioner alleges the removal of ***, ***, from the Student's campus at the end of October *** altered the Student's program because there was no longer a special education teacher present on the Student's campus. The threshold inquiry beneath this issue is whether or not the District was obligated to keep *** as a special education teacher who visited the Student's classroom for 30 minutes each day to help the Student transition back to the regular education classroom. After review of the record, I find that there was no legal requirement for a special education teacher to be assigned within the Student's classroom as an inclusion teacher or as an aide, a fact admitted by both the Parent and *** at hearing. Instead, the record before me established that the May *** ARDC specified paraprofessional support available “as needed” within the kindergarten classroom. [P.Ex. 10 at 26; R.Ex. 45 at 32]. Even if the removal of *** from the *** classroom was a change of the Student's program, Petitioner failed to show any harm that resulted from the special education teacher's reassignment.

Progress Report Documentation in Fall ***

Petitioner alleged a failure of the District to provide progress reports in the fall semester of the Student's *** year. At the due process hearing, the Parent referred to the Fall *** semester progress reports as “the January *** progress reports,” admitting receipt of all reports, with some reports arriving four or five weeks late. [Tr. at 378]. Petitioner did not produce evidence that the late receipt of the progress reports either harmed the Parent's ability to

participate in the ARDC process or harmed the Student. Even with a delay of four to five weeks, I infer that the Parent had all progress reports well in advance of the next ARDC meeting held on March 24, ***, allowing the Parent to prepare for and discuss any issues contained in the progress reports. I find for Respondent on this issue.

Regression after December * Holiday Break**

Petitioner alleged the Student suffered regressive symptoms after the December *** holiday break as the Spring *** semester began. Previously after the November *** Thanksgiving holiday break, the Parent reported behaviors of the Student with self-monologues and a type of re-creation of the school environment. After the December *** holiday, the Parent communicated additional concerns to the Student's teacher regarding ***, increased stimming behavior, and possible overstimulation. The record includes written communication between the Parent and District educators regarding these concerns and replies of District personnel that, in fact, regression was not evident as the Student began the *** semester.

The *** teacher issued the Student's progress report concerning the past nine weeks of school progress on January 14, ***. This document notes the Student's progress on areas of turn-taking, following directions, and positive social interactions. In addition to reports of the Student's *** teacher on the progress report and through written communication to the Parent, the record includes documentation of the 9.5 hours of observation by District LSSP, ***, conducted as part of the District's FBA. These observations occurred between November *** and January *** – the same period of time in which the Parent noted regressive behaviors in the home setting. *** did not observe regressive behaviors within the school setting.

While the Parent observed regressive behaviors within the home setting, there was no evidence that these behaviors occurred in the school setting or that the student lost critical skills as school resumed for the spring semester. The preponderance of the evidence does not support Petitioner's regression allegation within the school setting after the December *** holiday break.

Provision of Assistive Technology

Petitioner's due process complaint alleges a failure to provide assistive technology as previously agreed. When given the opportunity to specify what assistive technology had not been provided to the Student, Petitioner did not respond by the clarification deadline.² At hearing, however, Petitioner produced evidence that Respondent failed to provide *** in the Student's work areas.

Under IDEA's implementing regulations, an AT device is defined as any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability but excludes a medical device that is surgically implanted, or the replacement of such device. 34 C.F.R. § 300.5. Petitioner did not produce evidence that ***, in fact, qualify as AT.

Presuming, however, that *** are AT, the record before me shows the District and the Parent communicated between May *** and March *** regarding ***; only after March 28, ***, based on the District's prior written notice document, did the District agree to provide ***. [R.Ex. 130]. By the end of March *** when *** were in place within the *** classroom, no difference could be noted in the student's functioning within the *** classroom. I find for Respondent on this issue.

Social Skills Training

Petitioner alleges Respondent failed to provide social skills training for the Student. Petitioner did not meet this burden. The record evidence established that the Student's ARDC had a social skills IEP in place for the Student written by the October *** ARDC. The *** teacher implemented the social skills IEP within the general education *** curriculum by the general education counselor, ***. The evidence showed that *** formed a social

² Pre-hearing Order No. 2 (March 29, 2011), at footnote 3 stated, "Petitioner had until on or before 5:00 p.m. on Monday, March 21, 2011, to clarify what assistive technology was not provided for Petitioner; Petitioner did not meet this deadline."

skills group for the Student with two typically developing peers and met with this group once a week. [R.Ex. 139]. At the hearing, *** described the social skills curriculum used in the small group sessions and in the meetings with the Student’s *** class once a week, noting that the Student worked well within both the small group and the classroom. [Tr. at 664 and 668].

Under the Texas Essential Knowledge and Skills (“TEKS”) curriculum in place for the *** school year, social skills are included in the *** Social Studies curriculum. 19 TEX. ADMIN. CODE §***. For example, under §*** Social Studies Skills, students are expected to ***. Kindergarten students are expected to develop social studies skills ***. The evidence established that the Student received such social skill instruction through the TEKS curriculum as implemented by the Student’s *** teacher, ***. The *** teacher gave convincing and credible testimony that her students received *daily* instruction in social skills. I find for Respondent on this issue.

Provision of FAPE

Reviewing the record as a whole, the evidence before me shows that Respondent developed an educational program for this Student during the applicable period that was individualized for this Student’s specific needs, was based on a plethora of input from observation data, evaluation data using standardized instruments, ABA documentation, and other measures of the Student’s performance and functioning.

When the Student progressed in the District’s program with SI *** eligibility and reached the end of eligibility for *** in Fall ***, the Student continued to receive individualized services to meet the Student’s needs including OT, speech therapy, and social skills IEPs. The evidence shows the Student received promised paraprofessional support within the general education setting when the Student needed the assistance.

Petitioner did not dispute that the Student was educated in the least restrictive environment, with placement within the general education *** class.

The District provided services to the Student in a cooperative and collaborative manner. There is an abundance of record evidence to support the communication, collaboration, and cooperation of the District and the Parent. Documentation from both Petitioner and Respondent established that District staff responded to inquiries, suggestions, and requests from the Parent. The communications and ARDC documentation in the record show that many, if not most, of the recommendations from the Parent were followed. For example, when asked by the Parent, the *** teacher agreed to track the Student’s behavior and did so throughout the year using the Parent’s suggested behavioral chart. When the Parent requested observation of the Student within the classroom by an ABA-trained observer, the District provided the observations. Likewise, when the Parent requested an IEE upon disagreement with the District’s re-evaluation and additional assessment completion, the District agreed. The District participants in the March 2011 ARDC meeting were courteous and professional throughout the long meeting. [P.Ex. 34A, Discs 1-4].

The Student demonstrated both academic and non-academic benefits within the District’s program during the period from February 28, ***, to the Student’s withdrawal in August *** from the District. The collected data on the Student observed and reported during this period concerning positive benefits is summarized below:

Date	Reported in/by:	Positive Benefit(s) reported	Tr. or Ex.
February ***	BCABA Observations ***	Numerous strengths and abilities including attending to the teacher during group lessons, working in small groups at tables, and reciprocal language with peers.	P. Ex.39; R. Ex.42; Tr. 394
May ***	ARDC Reports	Mastery of many goals, *** (***) and *** classes), mastery of many skills; and, report of “great progress”	P. Ex.10; R.Ex.45
July ***	ABA Private Therapy Dismissal	Student dismissed from individual ABA therapy; ABA therapist expresses belief that Student’s needs could be met at school.	R. Exs.58 & 158; Tr. 37-38 & 41
Fall 2010	Supplemental Assessment	Report of *** teacher: Student as *** reader in class, with good *** and fine motor skills, and exhibiting improved socializing with peers.	P. Ex. 20; R. Ex.58

October ***	ABA-TOT Observation	No differences noted between Student and peers, compliant and engaged behaviors	R. Ex. 61; Tr. 450-451
November *** to January ***	LSSP Observations	Mostly appropriate behavior with no recommendation for a BIP.	P. Ex. 24
December ***	BCABA Observation in *** Classroom	Use of spontaneous language, full participation in independent activities, reciprocal language usage with peers and teachers, exhibit neat/ legible handwriting compared to students within same group. Student indistinguishable from peers; did not stand out.	P. Ex. 39; R. Ex. 85; Tr. 407-408
December *** to February ***	Behavior Progress Reports by *** Teacher	Many notations of “good day” and “followed teacher directives” within an appropriate time.	P. Ex. 15 R. Ex 90
January ***	Progress report (***)	“Great progress” in following directions, positive social interactions, and taking turns.	R. Ex. 90
***	Grades (***)	Student’s grades steadily improved all year.	R. Ex. 144
March ***	BCABA Observation on Playground	Use of appropriate spontaneous language and play, use of reciprocal language, made appropriate requests for attention from adults and peers, and made appropriate requests for information from adults. No recommendations from BCABA for the *** classroom teacher at this time.	P. Exs. 39 & 40 R. Exs. 123 & 157; Tr. 415

The snapshot view of the Student during the applicable time period undeniably presented a challenging task for educators considering eligibility categories, precisely as evidenced by the differing views expressed by the IEE evaluator and District ARDC participants in the March 2011 ARDC regarding the Autism eligibility classification. Certainly the interventions and program in place, through the combined efforts of the Parent, service providers, and educators, made the Student’s progress possible within the general education setting. However, when faced with differing opinions on the precise eligibility label of this Student, the record shows the District did not allow the labeling process to drive the educational decisions. Instead, District staff and teachers kept correct focus on the Student’s specific needs. The ARDC developed and delivered an appropriate program for the Student in full collaboration with the Parent. The District fully acknowledged the reality that the current picture for this Student may change, and at such future time, indicated willingness to re-evaluate and review those future and as yet unidentified needs.

The totality of the record shows the District’s educational program for this Student – regardless of the Student’s disability classification – indeed met the Student’s current individualized needs. I conclude that the Student received a FAPE within the District’s programming and services during the applicable limitations period that delivered educational benefit within the general education setting. Petitioner did not prove that the educational benefit of the program diminished or weakened upon *** and did not prove that the Student was harmed. Accordingly, I decline to award any relief to Petitioner.

Conclusions of Law

1. Respondent is the local educational agency responsible for determining the student’s eligibility for special education and related services under IDEA. 20 U.S.C. §1400, *et. seq.*, and its implementing regulations.
2. A party who challenges the school district’s eligibility determination or offer of services under IDEA bears the burden to prove that the student has been denied a FAPE. *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983), *aff’d on other grounds sub nom., Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984); *Schaffer v. Weast*, 126 S.Ct. 528 (2005).
3. Respondent’s removal of *** as an eligibility classification was not in error. 34 C.F.R. §300.8(b); 19 TEX. ADMIN. CODE §89.1040(c)(13); *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983); *aff’d on other grounds sub nom., Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984).

4. Respondent's decision not to add Autism as an eligibility classification was not in error. 34 C.F.R. §300.8(c)(1); 19 TEX. ADMIN. CODE §89.1040(c)(1); *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983); *aff'd on other grounds sub nom., Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984).
5. Petitioner failed to meet its burden of proof that Respondent should have, and yet did not, provide extended school year ("ESY") services for the Student for Summer ***. 34 C.F.R. §300.106(a)(1); 19 TEX. ADMIN. CODE §89.1065; *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983); *aff'd on other grounds sub nom., Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984).
6. Petitioner failed to meet its burden of proof that Respondent failed to conduct classroom observations by an Applied Behavior Analysis ("ABA") specialist of Petitioner. *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983); *aff'd on other grounds sub nom., Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984).
7. Petitioner failed to meet its burden of proof that Respondent did not provide training specific to the Student for teachers working with the Student. *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983); *aff'd on other grounds sub nom., Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984).
8. Petitioner failed to meet its burden of proof that Respondent altered the Student's educational program by removing special education staff from the Student's campus. *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983); *aff'd on other grounds sub nom., Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984).
9. Petitioner failed to meet its burden of proof that Respondent did not provide Fall *** progress reports to Petitioner. *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983); *aff'd on other grounds sub nom., Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984).
10. Respondent fully addressed reports of the Student's regression after Fall *** holiday breaks; Petitioner did not meet its burden of proof to show regression after Fall *** holiday breaks. *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983); *aff'd on other grounds sub nom., Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984).
11. Petitioner failed to meet its burden of proof that Respondent did not address the Student's assistive technology ("AT") needs. 34 C.F.R. § 300.5; *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983); *aff'd on other grounds sub nom., Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984).
12. Petitioner failed to meet its burden of proof that Respondent did not provide appropriate social skills training for the Student. 19 TEX. ADMIN. CODE §***; *Tatro v. State of Texas*, 703 F.2d 823 (5th Cir. 1983); *aff'd on other grounds sub nom., Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984).
13. Respondent provided a free appropriate public education ("FAPE") to Petitioner. *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982); *Cypress Fairbanks Independent School District v. Michael F.*, 118 F.3d 245 (5th Cir. 1997).

ORDERS

Based upon the record of this proceeding, the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED that the relief requested by Petitioner is **DENIED**.

IT IS FURTHER ORDERED that any and all additional or different relief not specifically ordered herein is **DENIED**.

Signed this 13th day of January 2012.

/s/ Mary Carolyn Carmichael

Mary Carolyn Carmichael
Special Education Hearing Officer

NOTICE TO THE PARTIES

This decision is final and immediately enforceable, except that any party aggrieved by the findings and decision may bring a civil action in any state court of competent jurisdiction or in a district court of the United States as provided in 20 U.S.C. §1415(i)(2); 34 C.F.R. §300.516; and 19 Tex. Admin. Code §89.1185(o).

STUDENT, b/n/f/ PARENT, Petitioner	§	BEFORE A SPECIAL EDUCATION
	§	
	§	
v.	§	HEARING OFFICER
	§	
VICTORIA INDEPENDENT SCHOOL DISTRICT, Respondent	§	FOR THE STATE OF TEXAS

SYNOPSIS OF DECISION

ISSUE A: *Whether the school district failed to identify the Student as a student eligible for special education and related services due to a disability of Autism Spectrum Disorder?*

HELD: **For the School District**

CITATION: 34 C.F.R. §§300.8(b)-(c)(1) and 300.306(c)
19 TEX. ADMIN. CODE §89.1040(c)(1) and (13)
Tatro v. State of Texas, 703 F.2d 823 (5th Cir. 1983); *aff'd on other grounds sub nom., Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984).

ISSUE B: *Whether the school district was obligated to provide, and failed to provide, Extended School Year services for the Student in Summer ***?*

HELD: **For the School District**

CITATION: 34 C.F.R. §300.106(a)(1).
19 TEX. ADMIN. CODE §89.1065.
Tatro v. State of Texas, 703 F.2d 823 (5th Cir. 1983); *aff'd on other grounds sub nom., Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984).

ISSUE C: *Whether the school district conducted agreed classroom observations by an Applied Behavior Analysis (“ABA”) specialist?*

HELD: **For the School District**

CITATION: 34 C.F.R. §300.34(c)(10)(iii)-(iv).
Tatro v. State of Texas, 703 F.2d 823 (5th Cir. 1983); *aff'd on other grounds sub nom., Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984).

ISSUE D: *Whether the school district provided training specific to the Student for teachers working with the Student?*

HELD: **For the School District**

CITATION: 34 C.F.R. §300.6(f)
Tatro v. State of Texas, 703 F.2d 823 (5th Cir. 1983); *aff'd on other grounds sub nom., Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984).

- ISSUE E:** *Whether the school district altered the Student's educational program by removing special education staff from the Student's campus?*
- HELD:** **For the School District**
- CITATION:** 34 C.F.R. §300.323(d)
Tatro v. State of Texas, 703 F.2d 823 (5th Cir. 1983); *aff'd on other grounds sub nom., Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984).
- ISSUE F:** *Whether the school district failed to provide Fall *** progress reports to the Parent?*
- HELD:** **For the School District**
- CITATION:** 34 C.F.R. §300.320(a)(3)(ii)
Tatro v. State of Texas, 703 F.2d 823 (5th Cir. 1983); *aff'd on other grounds sub nom., Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984).
- ISSUE G:** *Whether the school district fully addressed reports of the Student's regression after Fall *** holiday breaks?*
- HELD:** **For the School District**
- CITATION:** 34 C.F.R. §300.324(b)(1)(ii)(A)
19 TEX. ADMIN. CODE §89.1065(4)(B)
Tatro v. State of Texas, 703 F.2d 823 (5th Cir. 1983); *aff'd on other grounds sub nom., Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984).
- ISSUE H:** *Whether the school district failed to address the Student's assistive technology needs?*
- HELD:** **For the School District**
- CITATION:** 34 C.F.R. §§300.5 and 300.105
Tatro v. State of Texas, 703 F.2d 823 (5th Cir. 1983); *aff'd on other grounds sub nom., Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984).
- ISSUE I:** *Whether the school district failed to provide appropriate social skills training for the Student?*
- HELD:** **For the School District**
- CITATION:** 34 C.F.R. §300.34(c)(2)
19 TEX. ADMIN. CODE §§89.1055 AND 113.2
Tatro v. State of Texas, 703 F.2d 823 (5th Cir. 1983); *aff'd on other grounds sub nom., Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984).
- ISSUE J:** *Whether the school district provided a free appropriate public education to the Student?*
- HELD:** **For the School District**
- CITATION:** 34 C.F.R. §§300.17 and 300.513(a)
Tatro v. State of Texas, 703 F.2d 823 (5th Cir. 1983); *aff'd on other grounds sub nom., Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984); *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982); *Cypress Fairbanks Independent School District v. Michael F.*, 118 F.3d 245 (5th Cir. 1997).